Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1080

In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

vs.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONER

RONALD L. DAY*
LAURIE W. JONES
FENTON, FENTON, SMITH, RENEAU & MOON
One Leadership Square, Suite 800
211 North Robinson
Oklahoma City, Oklahoma 73102
(405) 235-4671
Attorneys for Petitioner

*Counsel of Record

June 1, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Central to the resolution of the primary questions presented for review in this case is the answer to the most important unresolved question in desegregation law: What is the *effect* of a finding that a school system has achieved *unitary status*?

---

1. Should a compulsory desegregation decree remain operative after a formerly *de jure* school system achieves unitary status?

2. Does the traditional standard for dissolution of injunctive decrees involving private wrongdoers, as enunciated in *United States v. Swift and Co.*, 286 U.S. 106 (1932), govern the dissolution of school desegregation decrees?

3. Subsequent to the achievement of unitary status, do parties challenging school board action adopting an elementary neighborhood school plan which curtails compulsory busing have the burden of proving the board adopted the plan with discriminatory intent, or is the plan scrutinized by its racially disproportionate effect?

4. What affirmative desegregation obligations, if any, does a formerly *de jure* school system have following its elimination of official discrimination and the achievement of unitary status?

5. What are the proper criteria for determining whether unitary status has been maintained?

QUESTIONS PRESENTED – Continued

6. Did the court of appeals afford sufficient deference to the factual factings of the district court in compliance with *Anderson v. Bessemer City*, 470 U.S. 564, 575-576 (1985)?

THE PARTIES

1. The original plaintiffs and intervenors in this case were:

Robert L. Dowell, an infant under the age of 14 years of age, who sued by A.L. Dowell, his father as next friend, Vivial C. Dowell, a minor by her father, A.L. Dowell, as next friend; Edwina Houston Shelton, a minor, by her mother Gloria Burse; Gary Russell, a minor, by his father George Russell; Stephen S. Sanger, Jr , on behalf of himself and all others similarly situated; Jenny Mott McWilliams, a minor and David Johnson McWilliams, a minor, who sued by William Robert McWilliams, their father and next friend, on behalf of themselves and all others similarly situated; Renee Hendrickson, a minor, Bradford Hendrickson, a minor, Cindy Hendrickson, a minor, and Theresa Hendrickson, a minor, who sued by Donna P. Hendrickson, as mother and next friend of each of said minors, and Donna P. Hendrickson, individually, for themselves and all others similar situated; David Webster Verity, a minor, by and through his next friend George L. Verity, and George L. Verity and Ellen Verity, for themselves and all others similarly situated; Taejemo Danzie, a minor by and through Mrs. A.J. Danzie, her next friend, and Mrs. A.J. Danzie, for themselves and all others similarly situated.

2. The applicants for intervention who sought to reopen this case in 1985 were:

Yvonne Monet Elliott and Donnoil S. Elliott, both minor children, by and through their parent and guardian, Donald R. Elliott; Diallo K. McClarty, a minor child, by and through his parent and guardian, Donna R. McClarty; Donna Chaffin and

THE PARTIES – Continued

Floyd Edmun, both minor children, by and through their parent and guardian, Glenda Edmun; Chelle Luper Wilson, a minor child, by and through her parent and guardian, Clara Luper; Donna R. Johnson, Sharon R. Johnson, Kevin R. Johnson, and Jerry D. Johnson, all minor children, by and through their parent and guardian, Betty R. Walker; Lee Maur B. Edwards, a minor child, by and through his parent and guardian, Elrosa Edwards; Nina Hamilton, a minor child, by and through her parent and guardian, Leonard Hamilton; Jamie Davis, a minor child, by and through his parent and guardian, Etta T. Davis; and Romand Roach, a minor child, by and through his parent and guardian, Cornelia Roach.

3. The original defendants in this case were:

The Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, a public body corporate; Jack F. Parker, Superintendent of the Oklahoma City Public Schools; M.J. Burr, Assistant Superintendent of Oklahoma City Public Schools; Melvin P. Rogers, Phil C. Bennett, William F. Lott, Mrs. Warren F. Welch, and Foster Estes, members of the Board of Education of Oklahoma City Public Schools, Independant School District No. 89, Oklahoma County, Oklahoma; William C. Haller, County Superintendent of Schools of Oklahoma County, Oklahoma.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	14
ARGUMENT	15
I. WHEN UNITARY STATUS IS ACHIEVED: (1) THE REMEDIAL DECREE SHOULD BE LIFTED, AND (2) SCHOOL AUTHORITIES SHOULD BE FREE FROM ALL FURTHER JUDICIAL CONTROL IN THE ABSENCE OF A SHOWING THAT THEY SUBSEQUENTLY ACTED WITH INTENT TO DISCRIMINATE	15
A. Unitariness Means The Constitutional Violation Has Been Corrected	15
B. In The Absence Of A Constitutional Violation There Is No Basis For Continuing The Remedial Decree	19
1. Nature of the Remedy	19
2. Scope of the Remedy	21
3. Busing	23
C. Once Unitary Status Is Achieved, The Injunctive Decree Should Be Lifted	25
D. The Swift Standard, As Applied By The Court Of Appeals, Is An Inappropriate Guide For The Dissolution Of A Remedial Desegregation Injunction	33

TABLE OF CONTENTS – Continued

Page

E. Subsequent to the Achievement of Unitary Status, Parties Challenging School Board Action Which Has A Disproportionate Racial Impact Shoulder The Burden of Proving The Board Acted With Discriminatory Intent Before Federal Court Jurisdiction May Again Be Invoked 37

1. Discriminatory Intent 38

2. Burden of Proof 39

3. Residential Segregation and Neighborhood Schools 41

4. Maintaining Unitary Status 43

II. THE COURT OF APPEALS' REASSESSMENT OF THE EVIDENCE, AND THE CHARACTERIZATION OF THE TRIAL COURT'S FINDINGS OF FACT AS CLEARLY ERRONEOUS, EXCEED THE CONFINES OF FED.R.CIV.P. 52(a) 44

A. Lack of Discriminatory Intent 46

B. Maintenance of Unitary Status 47

C. Attenuation of Conditions 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 18

Amadeo v. Zant, 486 U.S. 214 (1988) 50

Anderson v. Bessemer City, 470 U.S. 564 (1985) ... 45, 46, 50

Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977) 39, 46

Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976) 24

Brown v. Board of Education, 347 U.S. 483 (1954) (*Brown I*) 16, 25, 26, 38

Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*) 16, 17

City of Mobile v. Bolden, 446 U.S. 55 (1980) 42

Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) .*passim*

Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982) 41

Davis v. Board of School Commissioners, 402 U.S. 33 (1971) 18

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (*Dayton I*) 22, 38

Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*) ..... *passim*

Dowell v. Okl. City Public Schools, 307 F.Supp. 583 (W.D. Okl. 1970) 2, 41

Dowell v. Okl. City Public Schools, 677 F.Supp. 1503 (W.D. Okl. 1987) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Dowell v. Bd. of Educ. of Okl. City Public Schools, 795 F.2d 1516 (10th Cir. 1986) *cert. denied*, 479 U.S. 938 (1986) ..... *passim*

Dowell v. Bd. of Educ. of Okl. City Public Schools, 890 F.2d 1483 (10th Cir. 1989) ..... *passim*

Firefighters v. Stotts, 467 U.S. 561 (1984) 21

Fullilove v. Klutznick, 448 U.S. 448 (1980) 28

Green v. County School Board, 391 U.S. 430 (1968) 16, 17, 18, 25, 26

Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd, 883 F.2d 945 (11th Cir. 1989) 17

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) .. *passim*

Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*) 19, 20, 21, 22

Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*) *passim*

Money Store, Inc. v. Harris Corp. Finance, Inc., 885 F.2d 369 (7th Cir. 1989) 35

Montana v. United States, 440 U.S. 147 (1979) 18

Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987) 17, 29

Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) 3, 16, 35

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 39

Raney v. Board of Education, 391 U.S. 443 (1968) 25

Richmond v. Croson Co., 102 L.Ed.2d 854 (1989) .. 19, 28

TABLE OF AUTHORITIES – Continued

Page

Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir. 1986) *cert. denied*, 419 U.S. 938 (1986) 13, 18, 29, 32, 40

Ross v. Houston Independent School Dist., 699 F.2d 218 (5th Cir. 1983) 18

S.E.C. v. Blinder, Robinson and Co., Inc., 855 F.2d 677 (10th Cir. 1988) 33

Spallone v. United States, 107 L.Ed.2d 644 (1990) . 22, 45

Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (9th Cir. 1979) ..... *passim*

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) ..... *passim*

United States v. Overton, 834 F.2d 1171 (5th Cir. 1987) ..... *passim*

United States v. Swift and Co., 286 U.S. 106 (1932) *passim*

United States v. Texas Educ. Agency, 647 F.2d 504 (5th Cir. 1981) 18

United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968) 35, 36

United Steel Workers v. Weber, 443 U.S. 193 (1979) 28

Wainwright v. Sykes, 433 U.S. 72 (1977) 45

Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 28

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES

20 U.S.C. § 1701(a)(2) 41

Okla. Stat. tit. 70, § 1210.203 (1970) 41

Rule 52(a), Federal Rules of Civil Procedure 44, 45

Restatement (2d) of Judgments, Reporter's Note on Section 73 at 201 (1982) 35

Gewirtz, *Choice in Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L.Rev. 728 (1986) 21

Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585 (1983) 22, 23

Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L.Rev. 789 (1988) 25, 26, 35, 43

OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is reported at 890 F.2d 1483 (10th Cir. 1989). The opinion of the United States District Court for the Western District of Oklahoma is reported at 677 F.Supp. 1503 (W.D. Okl. 1987).

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on October 6, 1989. The Petition for Writ of Certiorari was granted on March 26, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The equal protection clause of the fourteenth amendment to the United States Constitution.

STATEMENT OF THE CASE

This case involves a formerly *de jure* school system which eliminated unlawful discrimination through sustained good-faith compliance with a court-ordered desegregation decree, and eight years subsequent to the achievement of unitary status, was persuaded by intervening demographic changes and educational considerations to adopt a neighborhood school plan, and curtail compulsory busing, for elementary students in grades 1-4. Since certain areas of Oklahoma City are residentially segregated, implementation of the new plan resulted in the enrollment at 11 of the system's 64 neighborhood elementary schools becoming greater than 90 percent black. Respondents challenged the racially disproportionate impact of the new plan, and this chapter of the litigation was opened.

1. History. – In Oklahoma, separate schools for blacks and whites were mandated by the state Constitution. In the wake of *Brown I*, however, the Oklahoma City School Board in 1955 adopted a neighborhood school policy based on "logically consistent geographical areas." *Dowell v. School Bd. of*

Oklahoma City, 244 F.Supp. 971, 976 (W.D. Okl. 1965).[1] This case was filed in 1961 after the school board adopted a special transfer policy which undermined the effectiveness of the neighborhood school system. Special transfers numbering from 4,000 to 5,000 each year allowed parents of white students living within an integrated neighborhood attendance area to transfer their children to all-white schools. *Dowell*, 219 F.Supp. 427, 446 (W. D. Okl. 1963). This transfer policy "naturally led to a higher percentage of segregation in those schools" which had become integrated. Thus, the special transfer policy was stricken down as unconstitutional. *Dowell*, 219 F.Supp. at 442.

The district court also found that when "making *initial* assignments", *Dowell*, 244 F.Supp. at 977 (emphasis added), the neighborhood school policy was inappropriate because it was superimposed over already existing residential segregation and "had the effect in *some* instances of locking the negro pupils into totally segregated schools." *Dowell*, 375 F.2d 158, 165 (10th Cir. 1967) (emphasis added). Residential segregation in Oklahoma City had been caused by "restrictive covenants", *Dowell*, 219 F.Supp. at 433, and "realtors, and financial institutions". *Dowell*, 244 F.Supp. at 975. "The [School] Board did *not* originate [the] patterns of residential racial segregation" which existed in Oklahoma City. *Dowell*, 307 F.Supp. 583, 594 (W.D. Okl. 1970) (emphasis added).

Throughout the 1960's the district court and the school board struggled with efforts to eliminate the vestiges of the dual school system. A number of "step-at-a-time plans" were implemented,[2] but without complete success. Subsequent to this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), however, a full and complete remedy was devised.

---

[1] Citations to reported opinions in this case are identified hereafter simply as *Dowell*.

[2] In 1965, for example, Classen and Central High School, and Harding and Northeast High School were paired and compulsory busing was first used to increase racial balance. *Dowell*, 375 F.2d at 164.

2. *The Finger Plan.* – In 1972, the district court handed down a decision ordering the Oklahoma City School Board to implement a desegregation plan which was commonly referred to as the "Finger Plan". *Dowell*, 338 F.Supp. 1256 (W.D. Okl.), *aff'd.*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). Like many other desegregation decrees governing large urban school systems, the Finger Plan employed the techniques of pairing, clustering and massive cross-town busing to integrate the elementary schools in Oklahoma City. The neighborhood school attendance zones adopted in 1955 served as a "feeder system" under the Finger Plan, and students of age residing in those zones were bused to middle schools and high schools in such a fashion as to create racial balance.

The district court's 1972 decree implementing the Finger Plan was a full and complete remedy. It was not a "step-at-a-time" plan by definition incomplete at inception, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 435 (1976). Rather, it was a comprehensive plan which the district court found would create a "unitary system" and remain in place "until it [was] clear that disestablishment of the dual system was complete." *Dowell*, 338 F.Supp. at 1271. It thus became the law of this case that the Finger Plan established a racially neutral and constitutional method of student assignment. *See, e.g., Spangler v. Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979) (Kennedy, J., concurring).[3]

3. *The Achievement of Unitary Status.* – Several years after the school board implemented the Finger Plan, it filed a motion to close the case alleging it "[had] eliminated all *vestiges* of state-imposed racial discrimination in its school system and [was] operating a *unitary* school system." *Dowell*, 606 F.Supp. 1548, 1551 (W.D. Okl. 1985) (emphasis added). After proper notice, the district court conducted a hearing "to

---

[3] The main opinion and the concurring opinion in *Spangler* are both opinions of the Court; the third member of the panel joined in both. 611 F.2d at 1242.

receive the evidence of both the plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools." Brief in Opp., App. 1a. The court "carefully reviewed this evidence and all of the reports it ha[d] received from the defendant and the Biracial Committee since the inception . . . of . . . the Finger Plan." *Id.*, at 2a.

Following the evidentiary hearing, the court entered an order on January 18, 1977, finding that the Finger Plan "was indeed a plan that worked and that substantial compliance with constitutional requirements ha[d] been achieved." *Id.* The court found that a "unitary system" had been "slowly and painfully accomplished over the sixteen years during which the cause ha[d] been pending." *Id.* "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races," the court said, "the board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of the court." *Id.* at 3a. The "Order Terminating [the] Case" dissolved the Biracial Committee and "terminated" all further "jurisdiction" in the case. *Id.* at 4a. Therefore, the district court found unitary status had been achieved only after a careful hearing and review of all aspects of the board's operations to ensure that all vestiges of prior discrimination had been eliminated.[4]

---

[4] The district court in 1977 did not, as the court of appeals suggests, merely find "certain components of unitariness to have been satisfied." *See, Dowell*, 890 F.2d 1483, 1491 (10th Cir. 1989). As the district court itself observed in 1985, "[a]t the time [the] court totally relinquished its jurisdiction over [the] case in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the school district had achieved the goal of being a desegregated non-racially operated and *unitary* school system." *Dowell*, 606 F.Supp. 1548, 1554 (W.D. Okl. 1985) (emphasis added). *See also, Dowell*, 677 F.Supp. 1503, 1506 (W.D. Okl. 1987) ("This court fully intended in 1977 to restore the school board to total independence and relinquish to the board all control over the school district . . . because the Oklahoma City Schools were at that time, as they are today, operating a *unitary* system,

(Continued on following page)

More importantly, plaintiffs did *not* appeal any part of the "Order Terminating Case." The unitary finding thus became a final order.[5] Those suggesting something less than a final and complete declaration of unitary status was achieved in Oklahoma City, therefore, have simply not studied the record.

4. The K-4 Neighborhood School Plan. – During the eight years following the unitary declaration, the Oklahoma City School Board continued to implement the tenets of the Finger Plan. However, during the thirteen years the plan was implemented, demographic changes took place in Oklahoma

---

(Continued from previous page)

wholly without discrimination to blacks or other minority students, faculty or staff.") (emphasis added).

[5] Eight years later, when respondents sought to collaterally attack the unitary finding in their challenge to the K-4 neighborhood school plan, the district court found it preclusive:

> (T)his court's finding in 1977 that a *unitary system* had been achieved by the Oklahoma City Public Schools is *res judicata* as to those who were then parties to this action . . . . There has been no showing in this case that the original plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present [respondents] are, therefore, *collaterally estopped* from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977 . . . .

Dowell, 606 F.Supp. at 1555 (emphasis added). Moreover, the court of appeals did not simply view the unitary finding as a lightly applied label without significance. Rather, the court of appeals *agreed* with the district court that the school district achieved unitariness in 1977 and that the finding was preclusive:

> When, five years later, the court determined that the implementation of the Finger Plan had resulted in *unitariness* within the district, that finding became *final*, and it, too, is *binding* upon the parties with equal force . . . . Thus, . . . the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977 . . . .

Dowell, 795 F.2d 1516, 1522 (10th Cir.) *cert. denied*, 479 U.S. 938 (1986) (emphasis added).

City which rendered inequitable that part of the plan affecting elementary students. This became apparent in 1984, when a committee study revealed the continuation of the plan at the elementary level would, *inter alia*, substantially increase the busing burden on young black children, and subject to closure a large number of schools in a predominately black area of the school district.[6]

To combat these inequities, and to increase parental and community involvement, the school board adopted for school year 1985-86 a student assignment plan which curtailed compulsory cross-town busing of elementary school children in grades 1-4, and reassigned those children to their neighborhood school. Like most other large metropolitian cities, Oklahoma City continues to have some residentially segregated areas.[7] Thus, implementation of the K-4 neighborhood school plan initially resulted in 11 of the school district's 64 elementary schools enrolling 90 percent or more black students.[8] The

---

[6] Respondents conceded to the existence of these inequities. *Dowell*, 677 F.Supp. at 1514 (W.D. Okl. 1987). One of respondents' expert witnesses, Dr. Finger, acknowledged that increased busing burdens on young blacks and the potential loss of fifth-year centers resulted from the "stand-alone" school feature in the old plan. (R. vol. VIII 1202). In fact, Dr. Finger expressed surprise that the plan had not already been modified as a result of demographic change. (Id. at 1198-99). Another expert for respondents, Dr. Gordon Foster, agreed that the inequities resulting from the "stand-alone" feature of the original plan justified modification. (*Id.*, at 1266-67). Even the court of appeals was "satisified the evidence reveal[ed] that because of population shifts in the District, it was necessary to modify the Finger Plan." (*Dowell*, 890 F.2d at 1498 (10th Cir. 1989).

[7] The geographical boundaries of the Oklahoma City School District cover more than 100 square miles, spanning two counties and several municipalities in addition to Oklahoma City.

[8] One of these schools, North Highlands, was not predominately black when the Finger Plan was implemented in 1972, but ultimately became so because of demographic shifts. *Dowell*, 677 F.Supp. at 1512. Another, Parker, is located in the Star-Spencer area which was originally exempted from the Finger Plan due to its remote geographical location.

(Continued on following page)

plan contained a "majority to minority" transfer provision which allowed the parent of any elementary student assigned to a school where their race was in the majority to obtain a transfer to a school where their race would be in the minority. This transfer option was encouraged through district-provided transportation, and is still being exercised by parents in the school district.[9] The plan called for the faculty and staff at all neighborhood elementary schools to remain racially mixed. Under the plan, all fifth year centers, middle schools and high schools continued to be racially balanced with the use of compulsory busing.

One of the objectives the board sought to achieve when adopting the new plan was to increase the level of parental involvement in the schools. When the board adopted the plan it was convinced, and virtually every expert witness in this case agreed, that parental involvement was essential to student academic achievement and a quality education. (R. vol. IV 515; vol. V 736; vol. VI, 849, 891, 916; vol. VII 1066-68; vol. IX 1455). The board's belief that neighborhood elementary schools would increase parental involvement was correct. After the plan was in operation for just one year, the number of PTA organizations increased by 100 percent, and PTA memberships increased by 80 percent. Following the second year of implementation, the number of PTA organizations had increased a total of 200 percent, and PTA membership had

---

(Continued from previous page)

Two more of these schools, Lincoln and Truman, were closed subsequent to the adoption of the neighborhood plan. Thus, only seven of the schools which were predominately black before the Finger Plan was implemented remain predominately black today.

[9] The "majority to minority" transfer option has long been recognized as an aid to desegregation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971); *Dowell*, 375 F.2d 158 (10th Cir. 1967). During school year 1985-86 a total of 332 parents exercised the option, and the following year a total of 181 exercised it. (Def. Ex. 108, R. vol. II 31, 34).

increased by a total of 144 percent.[10] (Def. Ex. 139, R. vol. IV 582; vol. V 625; Def. Ex. 140, R. vol. IV 578; vol. V 742).

5. Dowell I. – Respondents filed a motion to reopen the case challenging the unitary status of the school district and the constitutional validity of the new plan. They claimed the neighborhood school plan resegregated the school district because it resulted in the creation of the predominately black neighborhood schools.

Following an evidentiary hearing, the district court found: (1) its unitary finding in 1977 was binding, (2) that the school district remained unitary in 1985, and (3) that the neighborhood school plan was constitutional since it was not adopted with the intent to discriminate on the basis of race. *Dowell*, 606 F.Supp. 1548 (W.D. Okl. 1985). Thus, the court concluded that special circumstances did not exist which warranted reopening the case.

6. Dowell II. – The court of appeals agreed that the 1977 finding of "unitariness within the district, . . . became final, and . . . [was] binding upon the parties." *Dowell*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). However, even though the Oklahoma City School District had achieved unitary status, the court of appeals

---

[10] Also, Open House attendance was up 5,167, and 3,745 more parents attended parent/teacher conferences, in 1986-87 than in the year preceding the plan, (Def. Ex. 140; R. vol. IV 578, vol. V 742; Def. Ex. 144-146; R. vol. II 31, 34).

Expert testimony presented at the hearing directly related increases in parental and community involvement to the adoption of the neighborhood plan. (R. vol. III 349-50; vol. IV 428-29, 518-20, 584-85; vol. V 630, 736-37, 775; vol. VI 853-54, 868, 897, 919).

The increased level of parental involvement which came with neighborhood schools coupled with the board's "Effective Schools" curriculum resulted in overall academic gains at eight of the predominately black elementary schools which exceeded the average gains made by black children nationally. (Def. Ex. 185, R. vol. II, 34, 35; R. vol. VI 933-34). Further, between 1985-86 and 1986-87 the gap between third grade black and white student achievement test scores was reduced by 13 percent. (Def. Ex. 185 at 4, R. vol. II 34, 35).

concluded the school board continued to be governed in 1985 by the terms of the original desegregation order entered thirteen years earlier: "[W]ithout specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of segregation." *Id.*, at 1520. Thus, the court concluded the district court erred in searching the record for discriminatory intent, and reversed with instructions that the school board had the burden to prove that "changed conditions require[d] modification or that the facts or law no longer require[d] the enforcement of the order." *Id.*, at 1523.

7. Dowell III. – On remand in 1987, the district court recognized that the "fundamental issue" it had to address, in light of the Tenth Circuit's remand instructions, was "whether the school board had shown a substantial change in conditions warranting dissolution or modification of the 1972 order." *Dowell*, 677 F.Supp. 1503, 1506 (W.D. Okl. 1987). Since the existence of residential segregation in some Oklahoma City neighborhoods resulted in the predominately black elementary schools respondents were challenging, the district court correctly saw the necessity of determining the causes of present residential segregation in Oklahoma City. After a thorough analysis of pertinent demographic data, relocation statistics and expert testimony, the court found the residential segregation presently existing in Oklahoma City was too "attenuated" to be linked to the unlawful segregation of the past.[11] *Id.* at 1506-1513. Specifically, the court found the

---

[11] Without question, the evidence demonstrated that residential segregation no longer had the effect of locking certain black students into racially identifiable schools. In 1960 the historical concentration of black households in the east inner-city area was evident, (Def. Ex. 2, R. vol. II 31, 34). However, by 1980 there had been a substantial migration of blacks from the east inner-city to the northern, western and southern parts of the school district, (Def. Ex. 4, R. vol. II 31, 34). Two relocation studies which were admitted into evidence actually tracked the movement

(Continued on following page)

current causes of residential segregation in Oklahoma City were: (1) economics and housing affordability, (2) personal preferences and social relationships, (3) urban structure, and (4) to a limited extent, private discrimination.[12] *Id.* at 1511-1512.

(Continued from previous page)

of specific black families from the east inner-city area to previously all white sections of the school district, (Def. Ex. 7, R. vol. II 34; Def. Ex. 8, R. vol. II 77, 92).

While it is true that between 1960 and 1980 the east inner-city area remained predominately black, the evidence demonstrated there was quite a substantial decrease in the number of blacks choosing to live in this area. In 1960, for example, 84 percent of all blacks residing in the entire Oklahoma City metropolitan area lived in the east inner-city tracts. By 1980, however, only 16.8 percent of the entire black population in the metropolitan area lived in these tracts. (Def. Ex. 5D, R. vol. II 31, 34).

The evidence showed that the mobility of blacks in Oklahoma City resulted from the removal of the unlawful racial barriers of the past, (R. vol. II 52-53, 88). Indeed, black witnesses testified without contradiction that today black people in Oklahoma City voluntarily choose where they wish to reside without governmental restriction, (R. vol. III 313; vol. V 678). Today, black students reside in every neighborhood attendance area in the Oklahoma City school district, (Def. Ex. 11, R. vol. II 136, vol. III 295; Def. Ex. 12 and 13, R. vol. II, 34). By way of contrast, in 1972 virtually no black students (fewer than 1 percent) resided in 39 of these neighborhood attendance areas. *Id.* In sum, between 1972 and 1986, the population residing within the Oklahoma City school district decentralized in such a fashion that the exposure of blacks to non-blacks almost *doubled*, (Def. Ex. 40, R. vol. II 174, vol. III 295; R. vol. II 173). And, projections revealed that by 1995 no attendance area in the school district should have less than 16.2 percent blacks residing in it, (Def. Ex. 14, R. vol. II 143, vol. III 295).

[12] The evidence showed that 30 to 70 percent of racial separation in America today is attributable to economic status, (Def. Ex. 10 at 1, R. vol. II 91, 92). In this connection, black households prefer neighborhoods which are 50 percent black and 50 percent white, while whites prefer neighborhoods ranging from 0 percent to 30 percent black. *Id.* Once a neighborhood becomes 25 to 30 percent black, white households start

(Continued on following page)

The court then examined the evidence to determine whether the school district had maintained its unitary status from 1977 to date. After a review of pertinent factual information, the court analyzed the controlling decisions of this Court and concluded once again that the school district remained unitary. *Id.*, at 1517-1519. Recognizing the differentiating factor between *de jure* segregation and *de facto* segregation was the "purpose or intent to segregate,"[13] the court found that the K-4 neighborhood school plan did not undermine the unitary status of the school district because it was not adopted with the intent to discriminate on the basis of race. *Id.* at 1517-1518. Rather, the court found that the neighborhood school plan was adopted for the following nondiscriminatory reasons: (1) to avoid increased busing burdens on young black people, (2) to avoid the closure of fifth-year centers in the northeast quadrant, and (3) to increase parental and community involvement.[14] *Id.* at 1513-1514, 1516-1517.

Having the benefit of the facts related to the foregoing issues, the district court then addressed the issue of whether the 1972 decree should be dissolved. In the process of dissolving the decree, the district court relied upon the teaching of *Swann* that: it was the dismantling of the "dual school system" which was the target of the case, and the remedy was designed to operate only during the "interim period" when remedial adjustments were being made to eliminate the dual

---

(Continued from previous page)

leaving the neighborhood due to personal preference. However, the neighborhood changes as much because the white households prefer not to move into these areas, (R. vol. II 87-88). This evidence led the district court to conclude the exodus of a large number of blacks and the lack of white movement into the area left the east inner-city tracts much less populated, but still predominately black. *Dowell*, 677 F.Supp. at 1512.

[13] *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973).

[14] Again, we emphasize, respondents conceded the stand-alone school feature of the Finger Plan had been impacted by demographic change in such fashion as to increase busing burdens on young black and to subject fifth-year centers to possible closure. See, note 6, *supra*.

system.[15] *Id.* at 1520-1521. The court concluded the facts no longer required enforcement of the 1972 decree because the purposes of the litigation had been fully achieved. Specifically, the court found that the "substantial change in conditions" which over time resulted in the elimination of illegal discrimination, and the achievement of unitary status, was precisely the change which compelled dissolving the 1972 decree *Id.*, at 1520-1522. Respondents appealed.

8. Dowell IV. – The Tenth Circuit, in a 2-1 decision, reversed and remanded. The majority "approach[ed] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." *Dowell*, 890 F.2d 1483, 1486 (10th Cir. 1989). The majority took "the simple position that an injunctive order entered in a school desegregation case has the same attributes as any other injunctive order issued by a federal court." *Id.* at 1491. It concluded, therefore, that the standard articulated in *United States v. Swift and Co.*, 286 U.S. 106, 119 (1932) ("[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions"), governed the dissolution of the desegregation decree. *Id.* at 1490.

The majority of the panel believed the declaration of unitariness did not fit into the formula because the "injunction t[ook] on a life of its own and bec[ame] an edict quite independent of the law it [wa]s meant to effectuate," *Dowell*, 890 F.2d at 1490 (omitting citations). Indeed, the Tenth Circuit was of the view that the district court's "jurisdiction extend[ed] beyond the termination of wrongdoing." *Id.* Thus, "[t]he condition that eventuate[d] as a function of the injunction [unitariness] [could] not alone become the basis for altering the decree absent the *Swift* showing." *Id.* To reach this conclusion, the court reiterated and perpetuated a long standing conflict between the circuits:

> Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances

---

[15] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22, 24 (1971).

> which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra, United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.) *cert. denied*, 419 U.S. 938 (1986).

Id. at 1492.

Notwithstanding the unitary declaration, the panel majority found the board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects." *Id.* at 1504 (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 538). The majority, therefore, did not focus on whether the plan was "non-discriminatory".[16] 890 F.2d at 1504. Finding the board did not meet its burden under *Swift* to dissolve the decree, the court remanded the case with instructions, *inter alia*, to take evidence on alternatives to "maintain racially balanced elementary schools." *Id.* at 1506.

In a forceful yet eloquent dissent, Judge Baldock summed up the flaws with the majority's reasoning:

> This court's opinion is faulty for three reasons: (1) improper reliance upon principles concerning the modification and termination of injunctions which are inapposite in the school desegregation context, (2) inadequate recognition of the legal effect of the school district's unitary status, and (3) insufficient deference to the factual findings of the district court concerning segregative intent.

Dowell, 890 F.2d at 1507 (10th Cir. 1989) (Baldock, J., dissenting).

The dissenting panel member concluded that the majority ruling "denie[d] the essence of unitariness" and appeared to

---

[16] Even though the court concluded that discriminatory intent was not the pertinent inquiry, it nonetheless ruled that the district court entered clearly erroneous findings on the question of intent in the absence of an argument from respondents to that effect. The court rejected the plan because it "restore[d] the effects of past discriminatory intent remedied by the decree by recreating racially identifiable elementary schools, overlooking school capacity problems, and failing to address faculty imbalance." 890 F.2d at 1504.

"impose greater substantive burdens on a school board than before the unitary finding." *Id.* at 1520. Recognizing that the school district "proved non-segregative purpose to the district court," the dissent was of the view that the school district should not be monitored in perpetuity. *Id.* at 1540. The dissent would have "lifted" the original desegregation decree and returned the schools to "local control." *Id.*

SUMMARY OF ARGUMENT

The achievement of unitary status means that illegal discrimination and its vestiges have been eliminated, and that the constitutional violation has been cured. Continuation of the remedial injunction subsequent to the achievement of unitary status is thus inconsistent with the meaning of unitariness, and at odds with the purpose and scope of the desegregation remedy. Dissolution of the remedial injunction is warranted, therefore, once unitary status is attained. The continuance of the injunction in a unitary school system for the purpose of maintaining racial balance in the midst of residential segregation which cannot be eliminated, is to unconstitutionally require that the injunction and busing be maintained in perpetuity.

Application of the *Swift* standard to the dissolution of a remedial desegregation injunction is inappropriate unless unitariness is afforded its true meaning. The attainment of unitary status demonstrates the purposes of the litigation as incorporated in the decree have been fully achieved, and that a substantial change in conditions has occurred which justifies dissolving the remedial injunction.

After a declaration of unitariness, since all vestiges of the violation have by definition been eradicated, a school board may adopt a neighborhood assignment plan even if it has a disproportionate racial impact, provided that the board's action is not intentionally discriminatory and, therefore, is not a new constitutional violation. Since the burden allocation in a school desegregation case is based on policy and fairness, parties challenging post-unitary school board action which has a disproportionate racial impact should shoulder the burden of proving the board acted with discriminatory intent before federal court jurisdiction may again be invoked.

There is substantial evidence in the record to support the district court's factual findings that (1) the Oklahoma City School Board's neighborhood school plan was adopted without discriminatory intent, (2) that the school district remained unitary in 1987, and (3) that the relationship between past segregative acts and present residential segregation have become so "attenuated" as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention. The court of appeals failed to consider the record in its entirety, afforded insufficient deference to the district court's factual findings, and thus incorrectly concluded those findings were "clearly erroneous."

ARGUMENT

I. WHEN UNITARY STATUS IS ACHIEVED: (1) THE REMEDIAL DECREE SHOULD BE LIFTED, AND (2) SCHOOL AUTHORITIES SHOULD BE FREE FROM ALL FURTHER JUDICIAL CONTROL IN THE ABSENCE OF A SHOWING THAT THEY SUBSEQUENTLY ACTED WITH INTENT TO DISCRIMINATE

The call of the Tenth Circuit for a unitary school district to remain under the governance of a remedial decree for the purpose of maintaining racial balance in the absence of a new constitutional violation is based on sociological theory, not constitutional doctrine. Although the Court has yet to specifically define the effects of unitariness, it has slowly and methodically adopted governing principles in the context of school desegregation which provide the answers. We now turn our attention to an examination of those principles, and note that *Dowell's* approach disregards virtually each of them.

A. Unitariness Means The Constitutional Violation Has Been Corrected.

In order to define the effects of unitariness, it is first necessary to review its meaning. The genesis of unitariness is

linked to *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), which struck down state-imposed segregation in public schools as contrary to the equal protection guarantees of the Constitution. The maintenance of separate schools for black and white children was the constitutional violation which was required to be corrected by remedial measures. *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*). School authorities had no prior experience to prepare them for dealing with the changes and adjustments of the magnitude and complexity called for in *Brown II*. As a result, very little progress was made with the dismantlement of dual school systems which had long been maintained by state law.

Thus, in *Green v. County School Board*, 391 U.S. 430, 437-438 (1968), school authorities were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a *unitary* system in which racial discrimination would be eliminated root and branch," (emphasis added). This charge placed the burden on school authorities "to come forward with a plan which promise[d] realistically to work '*now*' . . . until it [wa]s clear that state-imposed segregation ha[d] been completely removed," *Id.*, at 439. When school authorities failed in their affirmative obligations, district courts were given "broad power to fashion a remedy that [would] assure a *unitary* school system." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) (emphasis added). The achievement of unitary status, therefore, is the ultimate "goal" to be achieved in school desegregation litigation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-59 1979); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200-01 n. 11 (1973).

To assist school districts in achieving this goal, the Court handed down a number of decisions defining what steps were necessary to achieve unitary status. First, the Court determined that the mere implementation of a plan did not create a unitary system. While a final order adopting a desegregation plan "established a racially neutral system of student assignment," *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976), the unitariness determination had to consider

whether the plan was fully implemented in "good faith." *Brown II*, 349 U.S. at 299; *Green*, 391 U.S. at 439; *Swann*, 402 U.S. at 12.[17]

Second, the Court ruled that existing policies and practices with regard to "composition of student bodies," "faculty, staff, transportation, extra-curricular activities and facilities" had to be non-discriminatory before unitary status could be achieved. *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 18. Focusing solely on student assignment was improper. "[M]atters aside from student assignments [had to] be considered" before the unitariness determination could be made. *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 460 (1979). Additionally, "community and administration attitudes" towards the school system were a part of the formula. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 196 (1973).

Third, in *Spangler*, the Court reiterated that "the unitary system contemplated by . . . *Swann*" was achieved when "the affirmative duty to desegregate ha[d] been accomplished and racial discrimination through official action [wa]s eliminated from the system." *Spangler*, 427 U.S. 424, 436 (1976) (quoting *Swann*, 402 U.S. at 31-32). In this context, the elimination of racial discrimination meant that "all vestiges of state-imposed segregation" were to be eliminated, *Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (*Milliken II*), to the "greatest possible degree . . . taking into account the practicalities

---

[17] Accordingly, the First Circuit has observed that a history of "good faith" operation of the school system, in general, and implementation of assignment orders, in particular, support a finding of unitariness. *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987). Similarly, the Eleventh Circuit has ruled "[a] declaration of unitary status is . . . inappropriate when the evidence shows that school authorities have not consistently acted in good faith to implement the objectives of the plan." *Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd.*, 883 F.2d 945, 952 (11th Cir. 1989). *But see, Dowell*, 890 F.2d 1483, 1499 n. 41 (10 Cir. 1989) (rejecting the government's "contention that sustained compliance with a desegregation plan is entitled to great weight and should create at least a presumption of unitary status").

of the situation." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971); *Accord Swann*, 402 U.S. at 26.

Finally, the Court emphasized that the unitariness determination had to be made in light of local conditions. Since circumstances and demographics varied, "there [wa]s obviously no one plan that [would] do the job in every case." *Milliken II*, 433 U.S. at 287; *Green*, 391 U.S. at 439; *Keyes*, 413 U.S at 196. Consistent with this rationale, the Fifth Circuit has held that "[t]he decision that public school officials have satisfied their responsibility to eradicate segregation and its vestiges must be based on conditions in the district, the accomplishments to date, and the feasibility of further measures." *Ross v. Houston Independent School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983).[18]

Since unitariness signifies the elimination of unlawful discrimination and its effects from a school system, it by definition means that the previous constitutional violation has been corrected. The final declaration of unitary status achieved by the Oklahoma City School Board in 1977 carries this same meaning, because the attainment of that goal was only made possible by the district court's enforcement of, and the board's compliance with, the foregoing constitutional principles. Since unitariness means the effects of past discrimination have been eliminated, *Dowell's* directive for the Oklahoma City School Board to remain under the governance of the injunction in the absence of a showing of segregative purpose, because its neighborhood school plan "restore[d] the effects of past discriminatory intent," 890 F.2d at 1504, is at

---

[18] A finding of unitariness, therefore, is properly characterized as a finding of fact subject to the "clearly erroneous" rule. *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521, 533 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 420 (1986).

The principles of collateral estoppel and issue preclusion also apply to a final declaration of unitary status. *Riddick*, 784 F.2d at 531 (citing *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980), [and] *Montana v. United States*, 440 U.S. 147, 153-54 (1979)); *Dowell*, 795 F.2d 1516, 1522 (10th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986).

odds with the very meaning this Court has given to the achievement of unitary status.

B. In The Absence Of A Constitutional Violation There Is No Basis For Continuing The Remedial Decree.

Dowell's mandate for the continuation of the injunction subsequent to the achievement of unitary status for the purpose of maintaining racial balance is also contrary to constitutional principles which govern the nature and scope of a desegregation remedy.

1. Nature of the Remedy. – Rather than concentrating on mere numbers in a school, the consistent emphasis of this Court has been on the elimination of discriminatory *systems*. Speaking for a unanimous court in *Swann*, Chief Justice Burger stressed this premise:

> The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle *dual school systems*.
>
> We are concerned in these cases with the elimination of discrimination inherent in the *dual school systems*, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds.

Swann, 402 U.S. at 22-23 (emphasis added). *Swann's* mandate to target the system rather than the composition of the classroom has never been abandoned.[19]

---

[19] *See, e.g., Milliken v. Bradley*, 418 U.S. 717, 737 (1974) (*Milliken I*) ("The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems"); *Columbus v. Penick*, 443 U.S. at 458 ("Brown II was a call for the dismantling of well-entrenched dual systems."); *Richmond v. Croson Co.*, 102 L.Ed.2d 854, 902 (1989) (Scalia, J., concurring) ("We have stressed each school district's constitutional 'duty to *dismantle* its dual system'.")

Additionally, the Court has emphasized that the purpose of the remedy is *not* to maintain racial balance. *Swann* stressed that the Constitution did not require "any particular degree of racial balance or mixing." *Swann*, 402 U.S. at 24.[20] The Court repeatedly held that the use of mathematical ratios to maintain racial balance was sanctioned as "no more than a starting point in the process of shaping a remedy" during the transitory period when the dual school system was being disestablished. *Swann*, 402 U.S. at 25; *Spangler*, 427 U.S. at 434. And, it was clear that even during this transitory period that "the existence of some small number of one-race or virtually one-race schools within a district [did] not in and of itself . . . mark . . . a system that still practice[d] segregation by law." *Swann*, 402 U.S. at 26.

Therefore, "the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." *Milliken II*, 433 U.S. at 280-281 n. 14. Indeed, in the remedial phase of the case when the dual school system was being dismantled, the existence of racial imbalance "simply . . . shift[ed] the burden of proof" to school authorities, it did not "equat[e] with a constitutional violation calling for a remedy." *Milliken I*, 418 U.S. at 741 n. 19.

In Oklahoma City, the binding declaration of unitary status entered in 1977 signified that the dual school system had been dismantled, and that the objective of the remedy had been achieved. The Tenth Circuit's attempt to subsequently continue the decree for the purpose of maintaining racial balance is thus inconsistent with the nature of the remedy. Moreover, since empirical evidence demonstrates that residential segregation cannot be eliminated, (R. vol. II 115-116),

---

[20] *See also, Milliken I*, 418 U.S. at 740-41 ("The clear import . . . from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in any 'school, grade or classroom'."); *Accord, Spangler*, 427 U.S. at 434 ("The district court's interpretation of the order appears to contemplate the 'substantial constitutional right [to a] particular degree of racial balance or mixing' which the Court in *Swann* expressly disapproved.")

Dowell's mandate for continued integration becomes a permanent end-state requirement.[21]

We also submit that *Dowell's* directive is contradictory to the restorative nature of the remedy which "[wa]s to correct . . . the condition that offend[ed] the Constitution," *Swann*, 402 U.S. at 16,[22] and "to make whole the victims of unlawful conduct." *Milliken II*, 433 U.S. at 280-281 n. 15. Once unitary status is achieved, the victims of unlawful conduct have been restored and made "whole." Thus, rather than serving "to make whole the victims of unlawful conduct," *Dowell's* perpetuation of the remedy constitutes *retribution* to young school children who have never been the victims of unlawful discrimination. Such an exercise of judicial power finds no basis in the Constitution.

2. *Scope of the Remedy.* – Judicial powers in a school desegregation case have never been plenary. There were clearly defined " 'limits' beyond which a court [could] not go in seeking to dismantle a dual school system . . . [and] [t]hese limits [were] in part tied to the necessity of establishing that school authorities ha[d] in some manner caused unconstitutional segregation." *Spangler*, 427 U.S. at 434. Since "judicial powers [could] be exercised only on the basis of a constitutional violation," *Swann*, 402 U.S. at 16, federal court desegregation injunctions "exceed[ed] appropriate limits if they [were] aimed at eliminating a condition that d[id] not violate

---

[21] One commentator observes that such a requirement undercuts important ethnic values. *See* Gewirtz, *Choice in Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L.Rev. 728, 737 (1986) ("[T]he view that the Constitution permanently mandates integration without regard to the causes of nonintegration fails to take adequate account of values of ethnic group identity and pluralism that might be furthered in a nonintegrated setting. It disregards the fact that blacks themselves, like most other ethnic groups in the United States, might come to prefer nonintegrated settings, believing that the important interests are served by institutions in which they are not an 'integrated' racial minority.")

[22] *Accord, Milliken I*, 418 U.S. at 738; *Firefighters v. Stotts*, 467 U.S. 561, 587-588 (1984) (O'Connor, J., concurring).

the Constitution or d[id] not flow from such a violation." *Milliken II*, 433 U.S. at 282.[23]

The notion that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate," and thus "extends beyond the termination of wrongdoing," *Dowell*, 890 F.2d at 1490, simply ignores the limitations the Court heretofore placed on the scope of the remedy. Unitariness marks the elimination of the constitutional violation, and "[a]bsent a constitutional violation there [is] no basis for judicially ordering [the] assignment of students on a racial basis." *Swann*, 402 U.S. at 28; *Accord, Spangler*, 427 U.S. at 434.[24]

There is a good reason why judicial powers in a school desegregation case are not plenary. Public education in America "is perhaps the most important function of state and local governments," *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (*Dayton I*). In *Milliken I*, the court recognized that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." 418 U.S. at 741-742. "It is for this reason that the case for displacement of the local authorities by a federal court in a desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton I*, 433 U.S. at 410.[25]

---

[23] Therefore, "the nature of the violation determines the scope of the remedy," *Swann*, 402 U.S. at 16, and the remedy must be "commensurate with the violation." *Columbus v. Penick*, 443 U.S. at 465.

[24] The principle that there cannot be a remedy without a wrong is not unique to school desegregation cases. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (affirmative action) ("[T]he [Supreme] Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.")

[25] *See also, Spallone v. United States*, 107 L.Ed.2d 644, 655 (1990) ("The federal courts in devising a remedy must take into account the interest of state and local authorities in managing their own affairs, consistent with the Constitution.")

When a federal court enjoins the conduct of school officials, it acts in an administrative rather than a judicial capacity, thus intruding into areas not normally within its domain. Injunctive decrees in desegregation cases are therefore "frequently attacked as exceeding a court's remedial powers, on the ground that they interfere with a defendant's discretion to take steps that would not themselves violate the Constitution." Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585, 597 (1983). For these reasons, local school authorities must have the right to regain control of the school system once the injunction has achieved its remedial purpose.

3. Busing. – The compulsory busing of young students across town for the purpose of maintaining racial balance displaces the values of local automony more so than any other aspect of the remedy. Unfortunately, the permissible scope of busing as an implement to a remedial decree cannot be precisely defined due to the "infinite variety of problems presented in thousands of situations." *Swann*, 402 U.S. at 29. For this reason, busing of students to maintain racial balance has become the subject of great controversy.

Subsequent to *Swann's* authorization of busing as a limited desegregation tool, time and experience brought its effectiveness into question. Justice Powell, in his eloquent dissent in *Keyes*, 413 U.S. at 253, pointed out that "the single most disruptive element in education . . . [wa]s the wide spread use of compulsory busing, especially at elementary grade levels." Six years later, Chief Justice Burger recognized that "it [wa]s becoming increasingly doubtful that massive public transportation really accomplishe[d] the desirable objective sought." *Columbus v. Penick*, 443 U.S. at 469 (Burger, C. J., concurring.)

The Tenth Circuit's directive to racially balance the elementary schools in Oklahoma City "most certainly will require busing." *Dowell*, 890 F.2d 1483, 1506 (10th Cir. 1989) (Baldock, J., dissenting). Since busing is part of the remedy, its scope is necessarily limited to that of the remedy. Therefore, "large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school

authorities fulfilled their constitutional obligations in the past." *Austin Indep. School Dist. v. United States*, 429 U.S. 990, 995 (1976) (Powell, J., joined by Burger, C. J., and Rehnquist, J., concurring). When school authorities achieve unitary status, they have fulfilled their constitutional obligations of the past, and a federal court's use of busing to maintain racial balance is simply no longer justified under the Constitution.[26]

Moreover, a unanimous Court in *Swann* held busing was not warranted "when the time or distance of travel [wa]s so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. *Swann* went on to point out that the "limits on time of travel w[ould] vary with many factors, but probably with none more than the age of the students." *Id.* It is notable that demographic changes in Oklahoma City ultimately rendered the stand-alone school feature of the Finger Plan inequitable by increasing busing burdens on young black children. Indeed, the record here demonstrates that increased busing burdens on young blacks was a primary factor in the Oklahoma City School Board's decision to return to neighborhood schools in grades 1-4. This leads to the inescapable conclusion that neighborhood schools at the elementary level are appropriate in Oklahoma City irrespective of whether the Court decides the board should remain under the governance

---

[26] This does not mean, however, that the Oklahoma City School Board lacks the authority, by virtue of the achievement of unitary status, to continue the busing of students in grades 5-12. In *Swann*, the court recognized "[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 16. *Swann* went on to explain that "[t]o do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Id.*

of the remedial injunction. *See also*, Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L.Rev. 789, 833 (1988) ("[C]hanged circumstances may cause the busing plan to endanger health or education, although it did not do so when implemented. If so, those considerations will likely support the [neighborhood] plan.")

C. Once Unitary Status Is Achieved, The Injunctive Decree Should Be Lifted.

Desegregation injunctions are not designed to operate indefinitely. The remedial aspect of the decree by necessity places a temporal limitation on its usage. In *Brown II*, for example, the Court indicated the injunction would operate during a "period of transition" to effectuate a racially nondiscriminatory school system. 394 U.S. at 299. Over a decade later, *Green* reiterated that this "*transition* to a unitary, nonracial system of public education was . . . the ultimate end to be brought about," 391 U.S. at 436 (emphasis added), and concluded that a district court should "retain jurisdiction *until* it [was] clear that state-imposed segregation [had] been completely removed." *Id.*, at 439 (emphasis added).[27] *Swann* reemphasized the mandate of *Brown I* "to eliminate dual systems and establish unitary systems *at once*," 402 U.S. at 6 (emphasis added), and reaffirmed the teaching of *Green* that the remedy was intended to operate only during "*the interim period* when remedial adjustments [were] being made to eliminate the dual school system." 402 U.S. at 28 (emphasis added). Correct application of the remedy pursuant to the teaching of *Swann*, therefore, "proceeds from recognition that

---

[27] In *Raney v. Board of Education*, 391 U.S. 443, 449 (1968), the Court again recognized "the better course would be to retain jurisdiction *until* it [wa]s clear that disestablishment ha[d] been achieved" (emphasis added). The court in Raney articulated two reasons why the district court was to retain jurisdiction during this transitory period: (1) to ensure "that a constitutionally acceptable plan [wa]s adopted, and (2) that it [wa]s operated in a constitutionally permissible fashion so that the goal of a desegregated non-racially operated school system [wa]s rapidly and finally achieved." *Id.*

'the requirement of integration is a transitional rule, justified . . . under a corrective theory rather than a distributive or a prohibitory theory'." Landsberg, *supra*, at 807 (quoting Gewirtz, *Choice in the Transition*, *supra*, at 752).

Recognizing the temporary nature of the remedy, the Court in *Swann* ruled that the achievement of unitary status released school authorities from federal supervision:

> "At some point, these school authorities and others like them should have achieved full compliance with this court's decision in *Brown I*. The systems would then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by district courts should not be necessary."

Swann, 402 U.S. at 31-32.

While the Court in *Swann* clearly held that one effect of unitariness is the relinquishment of federal supervision, it was not until five years later in *Spangler* that the Court first addressed the effects of unitariness on a remedial decree. Starting in 1970, the Pasadena school system operated under a desegregation decree designed to eliminate schools with "a majority of any minority students." *Spangler*, 427 U.S. at 431. In 1974, the school board sought modification of the reassignment order because population shifts had undermined the effectiveness of the plan. The district court denied the request

and continued the annual reassignment of students, despite the absence of proof of deliberate school board efforts to undermine the decree. This Court reversed, holding that the district court abused its discretion by requiring annual reassignment of students absent proof that school authorities had deliberately caused changes in the racial mix. The Court emphasized that the desegregation plan ordered by the district court was "designed" to achieve a unitary school system, *Id.*, at 436, and thus concluded:

> "[H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the district court had fully performed its function of providing the appropriate remedy for previously racially discriminatory attendance patterns."

Spangler, 427 U.S. at 436-437.

The teaching of *Spangler*, therefore, is that once unitary status is achieved in the area of student assignment, school authorities are entitled to be relieved of the obligations imposed by the reassignment remedy. Although the dissent in *Spangler* did not agree that unitariness could be achieved in incremental fashion, it was of the view that *Swift* authorized alteration of the decree when unitariness had been achieved in all aspects of the school system:

> I see no reason to require the district court in a case such as this to modify its order prior to the time that it is clear that the entire violation has been remedied and a unitary system has been achieved. We should not compel the district court to modify its order unless conditions have changed so much that "dangers, once substantial, have been attenuated to a shadow." *United States v. Swift and Co.*, 286 U.S. 106, 119, 76 L.Ed. 999, 52 S.Ct. 460 (1932).

Spangler, 427 U.S. at 444 (Marshall, J., joined by Brennan, J., dissenting).

The inescapable conclusion to be drawn from *Swann* and *Spangler*, therefore, is that once a school system achieves a final declaration of unitary status as the Oklahoma City

School Board did in 1977, then it is entitled to have the entire desegregation decree lifted. Indeed, in *Wright v. Council of City of Emporia*, 407 U.S. 451, 470 (1972) the Court recognized that a desegregation "injunction does not have the effect of locking [a school district] into its present circumstances for all time," and that "[o]nce the unitary system has been established and accepted," it was appropriate to lift the injunction. *See also, Id.*, at 479 (Burger, C. J., joined by Rehnquist, J., dissenting) ("Judicial power ends when a dual school system has ceased to exist"); [and] *Richmond v. Croson Co.*, 102 L.Ed.2d 854, 902 (1989) (Scalia, J., concurring) ("[A]fter the dual school system has been completely disestablished, the state may no longer assign students by race").[28]

Consistent with the foregoing decisions, a number of lower courts addressing the termination issue have concluded that when unitary status is achieved the court ordered remedy has accomplished its purpose and should be lifted. When the Court remanded *Spangler*, for example, the Pasadena City Board of Education contended the district court should dissolve the injunction. Although the district court found the school board had substantially complied with the desegregation decree for several years, it refused to dissolve the injunction because there was evidence the Pasadena School Board "intended to return to the neighborhood school pattern existing before 1970, a configuration that would [have made] . . . racial percentages in the schools resemble the pre-1970 percentages." *Spangler v. Pasadena City Board of Education*,

---

[28] The court has also addressed the termination issue in contexts other than school desegregation. *See, e.g., United Steel Workers v. Weber*, 443 U.S. 193, 208-09 (1979) (observing that one feature establishing the permissibility of an affirmative action plan was that it was "a temporary measure" and would "end as soon as the percentage of black craftworkers approximate[d] the percentage of blacks in the local labor force"); [and] *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring) (observing that minority set-aside legislation "[wa]s not a permanent part of federal contracting requirements" since it contained an explicit termination provision.).

611 F.2d 1239, 1243 (9th Cir. 1979) (Kennedy, C. J., concurring).

On the school board's appeal, the Ninth Circuit reversed. It directed the district court to enter a order relinquishing all further jurisdiction and to return full control to the school board:

> From the standpoint of racial balance and pupil assignments, compliance with the Pasadena plan for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies. Further delay in returning full responsibility for administration to the school board is unjustified.

Spangler, 611 F.2d at 1244 (Kennedy, J., concurring). The Ninth Circuit thus recognized that "[t]he displacement of local government by a federal court [wa]s presumed to be temporary," *Id.* at 1241, and concluded that when the unconstitutional practice was eliminated, the "court-ordered remedy ha[d] accomplished its purpose." *Id.*, at 1242 (Kennedy, J., concurring).

Similarly, the First Circuit has concluded that if "schools have reached unitariness in student assignments," the "injunctive orders addressing the student assignment process" should be dissolved. *Morgan v. Nucci*, 831 F.2d 313, 326 (1st Cir. 1987). The First Circuit therefore is of the view that a school district's attainment of unitary status:

> represents the "accomplishment" of desegregation, and is the ultimate goal to which a desegregation court tailors its remedies once a finding of intentional discrimination is made. . . . [T]he one thing certain about unitariness is its consequences: the *mandatory* devolution of power to local authorities.

Morgan, 831 F.2d at 318 (emphasis added).

In a case which is factually indistinguishable from *Dowell*, the Fourth Circuit also concluded that unitariness brings an end to all judicial control over the schools. *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521 (4th Cir.) *cert. denied*, 419 U.S. 938 (1986). The Norfolk school system in 1975 was found unitary in an order like that in Oklahoma City

which terminated jurisdiction without dissolving the desegregation decree. Several years later the Norfolk board adopted a neighborhood elementary school plan which curtailed compulsory busing of students in grades 1-6. Because of residential segregation, a number of Norfolk's neighborhood schools were racially identifiable. The Norfolk plan was unsuccessfully challenged in district court, and the principal issue on appeal was the effect of the unitary finding upon the challenge to the new plan. *Id.*, at 534. Recognizing the pronouncement in *Swann* that unitary status signified the complete elimination of unlawful segregation, the Fourth Circuit ruled "once the goal of unitary status [wa]s achieved, the district court's role end[ed]" *Id.*, at 535, and held that the order finding Norfolk unitary "returned control of the city's schools to the school board." *Id.*, at 538.

Likewise, the Fifth Circuit has ruled that a unitary finding coupled with dismissal of the case ends the school board's obligation under the decree. *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987). In fact, the Fifth Circuit went so far as to hold that the attainment of unitary status coupled with the termination of jurisdiction meant the injunction was "absent." *Id.*, at 1175.

The only Circuit which has specifically ruled that a finding of unitariness does *not* warrant lifting the injunction is the Tenth Circuit:

> Nor, in our view does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra, United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 419 U.S. 938 (1986).

Dowell, 890 F.2d 1483, 1492 (10th Cir. 1989). The Tenth Circuit's error is not surprising, because it "approach[ed] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." *Id.* at 1486.

Aside from the constitutional principles we reviewed earlier, there are other important reasons which support the dissolution of the decree upon the achievement of unitary status. First, the original school board members who perpetuated segregation are most likely no longer in power. New board members who have dealt with the desegregation process are more attuned to their constitutional obligations and less likely to resurrect illegal segregation. Second, when a desegregation remedy has been implemented in good faith for a number of years, public perceptions about the racial character of schools have been transformed. In Oklahoma City, for example, an entire generation of children were educated for thirteen years under the governance of the Finger Plan at the elementary level.

Political conflict over the termination question also creates the danger that a temporary rule may become permanent. In other words, during the period of transition public attitudes grow accustomed to temporary measures which the law no longer requires. Next, there is a paternalistic aspect to compulsory desegregation because a judicial authority is sometimes concluding that an individual is not the best judge of what he really wants or what is in his own best interest. In America, choice cannot be dictated indefinitely. Finally, our racial history will always be with us. If the duty to eliminate the effects of past discrimination is carried past its constitutional limitations it becomes an absurdity, because it suggests we can remove ourselves from time.

The accolade of unitariness will not result in the wholesale dismantlement of desegregation plans. When unitary status is achieved and the injunction becomes inoperative, the immediate dismantlement of the plan without compelling reasons would certainly raise a question as to the board's intent and possibly subject it to further court supervision. Thus, the most likely and practical approach is for the board to continue to voluntarily follow the tenets of the desegregation plan until such time as demographic changes, educational policy or other legitimate non-discriminatory reasons compel the board to make necessary changes.

Indeed, this is precisely what happened in Oklahoma City. When the school board achieved unitary status in 1977, all further jurisdiction was relinquished and the case was closed. The court did not foresee that the board would take action which would result in the immediate "dismantlement of the plan." Brief in Opp., App. 2a. The Oklahoma City School Board voluntarily followed the tenets of the original plan for eight more years until, in 1985, demographic changes rendered the plan oppressive at the elementary level and prompted the board to assign students in grades 1-4 to neighborhood schools. Today, it implements the tenets of the plan at grades 5-12 where compulsory busing is still used to maintain racial balance. The approach we suggest in no way undercuts the constitutional rights of minority students. If the school board were to make any changes in student assignment with an intent to discriminate on the basis of race, then a new constitutional violation would be created and the district court would once again have remedial authority to correct that constitutional violation.

Once unitary status is achieved, the lifting of the injunction should become an administrative task. It is the achievement of unitary status, not mere dissolution of the injunction, which speaks to the board's past accomplishments and its future responsibilities. Indeed, as demonstrated by the foregoing decisions, this Court's emphasis has been directed at the dismantlement of dual systems, the achievement of unitary status, and finally the relinquishment of jurisdiction. As a result, the Court has heretofore never specifically emphasized the importance of dissolving the injunction. It is not surprising, therefore, that when the district court found the Oklahoma City School district unitary in 1977, it relinquished all further jurisdiction and closed the case, but did not in so many words specifically dissolve the injunction. "The board instituted the [K-4 neighborhood] plan believing, as did the [district] court, that the Oklahoma City schools were no longer subject to federal court supervision under *Swann*." *Dowell*, 677 F.Supp. at 1505.

Indeed, we submit this is precisely the reason the Fourth Circuit in *Riddick* and the Fifth Circuit in *Overton* ruled that

the achievement of unitary status coupled with an order terminating the case left the injunction inoperable in the absence of an order specifically dissolving it. To avoid any future misunderstanding, hindsight teaches the better course today would be for the court to enter an order dissolving the injunction, as the district court in Oklahoma City did in 1987. When the injunction is dissolved as an administrative matter there will be no doubt in the minds of the parties as to their future rights and obligations.

D. The "Swift" Standard, As Applied By The Court Of Appeals, Is An Inappropriate Guide For The Dissolution Of A Remedial Desegregation Injunction.

The majority of the panel writing for the court of appeals decided the dissolution question without giving any weight to the achievement of unitary status.[29] The panel majority relied on the standard set forth in *United States v. Swift and Co.*, 286 U.S. 106, 119 (1932), an anti-trust case, for the proposition that, despite unitariness, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" warrants dissolution of a desegregation decree. *Dowell*, 890 F.2d at 1490. However, as the dissenting panel member correctly observed, "[v]irtually all of the cases relied upon by [th]e court in its application of *Swift* involved unsuccessful attempts to obtain, modify or dissolve injunctions which forb[ade] or limit[ed] *private* commercial conduct." *Id.*, at 1514 (Baldock, J., dissenting) (emphasis added).

Under the Tenth Circuit's rule, it is "virtually impossible" to vacate or modify an injunction under the *Swift* standard when the beneficiary of the injunction does not consent. *S.E.C. v. Blinder, Robinson and Co., Inc.*, 855 F.2d 677, 679

---

[29] *See, Dowell*, 890 F.2d at 1492 ("Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the conditions which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521")

(10th Cir. 1988). Considering the constitutional principles previously reviewed, this simply cannot be true in the desegregation context.[30] We submit the Tenth Circuit's application of *Swift* failed to recognize that "[t]he issues involved in terminating a remedy generally mirror those a court faces when initiating a remedy." Gewirtz, *Choice in the Transition, supra*, at 790. Thus, the Tenth Circuit's application of the *Swift* standard in the desegregation context overlooked the importance of "local" autonomy, *Milliken II*, 433 U.S. at 280-82, and neglected to recognize that the remedy was designed "to repair the denial of a constitutional right," *Swann*, 402 U.S. at 16, and operate only during the "interim period" when remedial adjustments were being made to eliminate the dual school system. *Id.* at 28. Indeed, *Swift* itself distinguishes "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Swift*, 286 U.S. at 114.

Moreover, the Tenth Circuit overlooked the fact that the constitutional violation had been remedied once unitary status had been achieved. *See, Dowell*, 890 F.2d at 1490 ("The condition that eventuates as a function of the injunction [unitariness] cannot alone become the basis for altering the decree absent the *Swift* showing"). As the Fifth Circuit pointed out in *Overton*, 834 F.2d at 1176-77, this approach confuses the remedy with the constitutional violation.

Justice (then judge) Kennedy explained the inapplicability of *Swift* to a district court's termination of equitable jurisdiction in school desegregation cases in *Spangler v.*

---

[30] The court of appeals erred by concluding that "Fed.R.Civ.P. 60(b) codifies th[e] [*Swift*] standard," *Dowell*, 890 F.2d at 1490. If was not the purpose of Rule 60(b) to codify substantive law. *See*, Fed.R.Civ.P. 60(b) advisory committee note (1946 amendment) ("It should be noted that Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.")

Pasadena Bd. of Educ., 611 F.2d 1239, 1245 n. 5 (9th Cir. 1979):

> *Swift* involved the efforts of anti-trust defendants who had entered into a consent decree prohibiting anti-competitive actions to modify the decree by lifting some of its prohibitions. It is doubtful the case supports the district court's retention of jurisdiction. *Swift* establishes general criteria for dissolution or modification of prohibitory injunctions against private wrongdoers. More recent Supreme Court desegregation decisions have established specific criteria for dissolution of regulatory injunctions imposed upon public school authorities . . . . [T]hese criteria recognize (1) that the proper function of a school desegregation decree is remedial, and (2) necessary concern for the important values of local control of public school systems dictate that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. *See, Milliken v. Bradley* (*Milliken II*), . . . 433 U.S. [267], at 280-82, 97 S.Ct. 2749 [1977].

Justice Kennedy is not alone. *See, e.g., Money Store, Inc., v. Harris Corp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) (Posner, J., concurring) (observing the *Swift* standard, applicable in litigation over property rights, is ill-suited in litigation designed to reform public agencies); [and] Landsberg, *The Desegregated School System and the Retrogression Plan, supra*, at 828 (the *Swift* "articulation has been criticized as having 'language perhaps too strongly adverse to the possibility of modification.' In any event, that standard probably does not apply to school desegregation decrees . . . ." [quoting Restatement (2d) of Judgments, Reporter's Note on Section 73, at 201 (1982)]).

This is not to say, however, that *Swift* as subsequently clarified by *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968) has no place in the desegregation context, assuming of course unitariness is afforded its true meaning. In *United Shoe*, the Court noted *Swift* emphasized the

power of a court of equity "to modify an injunction in adaptation to changed conditions though it was entered by consent," *Id.* at 248, and stressed that the question in *Swift* was "whether enough had been shown to justify" modification. *Id. United Shoe* pointed out the danger of monopoly which led to the initial decree in *Swift* had not been removed. Thus, although in some respects the *Swift* decree had been effectuated, there was still a danger of unlawful restraints on trade which justified perpetuation of the decree.

United Shoe clarified *Swift's* meaning by explaining that the earlier statement in *Swift* – "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change [the decree]" – must be read in the context of the continuing danger of unlawful restraints on trade which the Court found still existed. *Id.* In conclusion, the Court in *United Shoe* ruled that "Swift teaches . . . a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed . . . if the *purposes of the litigation* as incorporated in the decree . . . have not been fully achieved." *Id.* (emphasis added).

United Shoe is particularly instructive here, because in Oklahoma City "the purposes of the litigation" as incorporated in the decree had been "fully achieved" at the time the dual school system was successfully dismantled and unitary status was achieved. In fact, this is precisely the basis upon which the district court in 1987 dissolved the injunction in Oklahoma City. The court viewed it essential to determine whether the "purposes of the litigation" as incorporated in the 1972 desegregation decree had been "fully achieved." *Dowell*, 677 F.Supp. at 1522 (W.D. Okl. 1987). The court found the purposes of this litigation had been fully achieved upon the attainment of unitary status, and that the "substantial change in conditions" which over time resulted in the elimination of illegal discrimination was "precisely the change which compel[led] dissolving the 1972 decree." *Id.*

The Tenth Circuit's application of *Swift* neither considers the clarifying language of *United Shoe* nor affords unitariness any meaning. This standard can only serve to have a chilling effect on legitimate changes in education policy and to defeat

important governmental and personal interests, because the school board will be obligated under the governance of a continuing decree to take racial factors into account in making important policy decisions long after discrimination has been eliminated and unitary status has been achieved. We submit the most significant problem with *Dowell's* mandate for continued judicial superintendence is the lack of judicial accountability for the results. One of the virtues of local autonomy is that school board members are accountable to the electorate for their actions. The democratic process, therefore, helps to ensure the best education possible for our children. Federal courts, on the other hand, are not accountable for the impact judicial superintendence has on the educational process. If the quality of education in America is to prosper, the important values of local autonomy must not be displaced indefinitely.

E. Subsequent To The Achievement Of Unitary Status, Parties Challenging School Board Action Which Has A Disproportionate Racial Impact Shoulder The Burden Of Proving The Board Acted With Discriminatory Intent Before Federal Court Jurisdiction May Again Be Invoked.

Swann held that once unitary status is achieved, further court intervention is not warranted "in the absence of a showing that . . . school authorities . . . ha[ve] *deliberately attempted* . . . to *affect* the racial composition of the schools." *Swann*, 402 U.S. at 32 (emphasis added). Notwithstanding, the court of appeals "focus[ed] not on whether the plan [wa]s non-discriminatory but whether it solve[d] the problems created by the changed conditions in the district." *Dowell*, 890 F.2d at 1504. Rather than focusing on the question of intent, *Dowell* incorrectly framed the issue as "whether the board's action in response to the changed conditions ha[d] the effect of making the district '*un*-unitary' by reviving the effect of past discrimination." *Id.* at 1499. Framing the issue in this fashion led the court to erroneously conclude the neighborhood plan was unacceptable because if "restore[d] the effects

of *past* discriminatory intent remedied by the decree by recreating racially identifiable elementary schools." *Id.* at 1504.

1. Discriminatory Intent. – While it is true that "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system," *Dayton II*, 443 U.S. at 538, it is important to remember the discriminatory intent inquiry is relevant during the remedial phase of a case. In *Dayton I*, 433 U.S. at 420, the Court held:

> "[T]he duty of both the district court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in schools has long since ceased, is first to determine whether there was any action in the conduct or the business of the school board which was *intended* to, and did in fact, *discriminate* against minority pupils, teachers, or staff." (emphasis added)

Since the discriminatory intent inquiry is the pertinent focus in the remedial phase of a case when the dual school system is being disestablished, it is beyond us how the Tenth Circuit concluded that it is not the test in judicial proceedings subsequent to the achievement of unitary status. The presence of racial imbalance in schools in the absence of a showing of discriminatory purpose constitutes "*de facto* segregation." *Swann*, 402 U.S. at 17-18. "[T]he differentiating factor between *de jure* segregation and . . . *de facto* segregation . . . is *purpose* or *intent* to segregate", *Keyes*, 413 U.S. at 208. Therefore, *de facto* segregation does not violate the Constitution. In Oklahoma City residential segregation has resulted in certain racially identifiable elementary schools, but in the absence of a showing of discriminatory purpose they are *de facto* segregated, do not violate the Constitution, and therefore do not warrant a remedy.

Moreover, the Tenth Circuit's conclusion that the neighborhood plan was impermissible because it restored "the effects of past discriminatory intent," *Dowell*, 890 F.2d at 1504, does not equate with a showing of unconstitutional purposeful discrimination. Discriminatory intent may not be

inferred solely from the "disproportionate impact" of a particular measure upon one race. *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 265 (1977). Nor does the "foreseeability of segregative consequences make out a prima facie case of purposeful race discrimination." *Dayton II*, 433 U.S. at 536-537 n. 9. As this Court stated in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979):

> " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group."

It is indeed perplexing why the Tenth Circuit found "discriminatory intent" was not the test, and yet went on to conclude the district court's findings with respect to the lack of "discriminatory intent" were "clearly erroneous." Be that as it may, as we will demonstrate later, the district court's finding that the plan was adopted for non-discriminatory purposes was not "clearly erroneous." By virtue of the remand instructions of the Tenth Circuit, the defendants carried the burden of persuasion in the proceedings below, and proved to the satisfaction of the district court that its neighborhood school plan was not adopted for discriminatory purposes. Even though the procedural framework of the proceedings placed the Board of Education in the position of proving its non-discriminatory purpose, respondents should have carried the burden.

2. Burden of Proof. – In a dual school system there is an increase in the probability that subsequent segregation might result from the same wrongful intent. Thus, the school board should bear the burden of justifying resegregatory actions from the time of the initial finding of the violation until the system becomes unitary.

However, since the burden allocation in a desegregation case is premised on "policy and fairness", *Keyes*, 413 U.S. at

2698, we submit the achievement of unitary status – signifying the elimination of illegal discrimination and its vestiges – should shift the burden to those challenging action which has a disproportionate racial impact, to prove the measure was adopted with the intent to discriminate on the basis of race before federal court jurisdiction could again be invoked.

Opponents to this position argue that the school board should continue to carry the burden of proof because it was the party that was guilty of purposeful discrimination originally, and it is sufficiently likely it will return to its bigoted ways. Another argument is that since the school board has superior access to proof and superior knowledge of the facts, it is better able to prove its intent. Arguments such as these, however, do not pass muster when scrutinized. As the Fifth Circuit in *Overton* recognized:

> The elements of a violation and who must bear the burden of their proof are not conceptually distinct from unitary status but are its components; indeed, the contrary assertion is dissembling. In the real world of trial and uncertain proofs, a perpetual placement upon a school board of the burden of persuading its innocence of conduct with segregative impact differs little in effect from the superintendence that attends an extant decree and pending suit. The argument . . . rests upon a fear that the Fourteenth Amendment, proscribing as it does only purposeful discrimination, inadequately protects desegregation gains, at least at the hand of a former wrongdoer.

Overton, 834 F.2d at 1176.

In *Overton*, the Fifth Circuit concluded that the end of judicial superintendence that accompanies unitary status results in the "release of [the] unitary district from the burden of proving that its decisions are free of segregative purpose." *Id.*, at 1175. *See also, Riddick*, 784 F.2d at 538 ("We hold that the burden of proving discriminatory intent attaches to a plaintiff once a *de jure* segregated school system has been found to be unitary.")

While the Oklahoma City School Board was placed in the posture of having to prove it did not adopt its neighborhood

school plan with discriminatory purpose, and aptly did so, we urge the Court to clarify the principles of burden-allocation in the post-unitary phase of a case, and hold that subsequent to the achievement of unitary status, parties challenging school board action which has a disproportionate racial impact shoulder the burden of proving that the action was motivated by discriminatory purpose.

3. Residential Segregation and Neighborhood Schools. – At this juncture, it is important to point out this Court's previous recognition that "[a] neighborhood school policy in itself does not offend the Fourteenth Amendment." *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 537-538 n. 15 (1982); *Accord, Swann*, 402 U.S. at 28. Thus, "[a] policy favoring neighborhood schools is not synonymous with an intent to violate the Constitution," *Spangler*, 611 F.2d at 1245 (9th Cir. 1979) (Kennedy, J., concurring), and "[a]n easily visible correlation between school segregation and residential segregation cannot by itself justify the blanket extension of a remedy." *Columbus v. Penick*, 443 U.S. at 478-79 (Stevens, J., concurring).

The benefits of neighborhood schooling are well known and too numerous to review here. *See, e.g., Keyes*, 413 U.S. at 245-247 (Powell, J., dissenting). Suffice it to say, it is the policy of the United States that "[t]he neighborhood is the appropriate basis for determining public school assignments," 20 U.S.C. §1701(a)(2), and likewise the policy of the state of Oklahoma that "insofar as practicable, each pupil shall be assigned to the school nearest his residence." OKLA. STAT. TIT. 70, §1210.203 (1970). Our point is simple. The policy behind and benefits of neighborhood schooling in America should not be undermined in the absence of a showing that such a plan was adopted in violation of the Constitution, or, in other words, adopted for purposefuliy discriminatory reasons.

It is important to remember that in Oklahoma City, "[t]he Board did *not* originate [the] patterns of residential racial segregation." *Dowell* 307 F.Supp. 583, 594 (W.D. Okl. 1970) (emphasis added). Additionally, Mr. Rabin, the expert witness for respondents who had studied the school district in great detail, testified he was not aware "of any action the board

took" following the district court's entry of its 1963 decree "which compelled" blacks to live in any residentially segregated neighborhood in Oklahoma City. (R. vol. VIII 1154-55). There are racially-imbalanced schools in every major urban area in the country that contain a substantial minority population. The evidence in this case demonstrated, as Justice Powell previously observed, that residential segregation "results primarily from familiar segregated housing patterns, which – in turn – are caused by social, economic and demographic forces for which no school board is responsible." *Columbus v. Penick*, 443 U.S. at 480 (Powell, J., dissenting).

The uncontroverted evidence showed that in Oklahoma City residential segregation cannot be eliminated by court order, board policy or otherwise (R. vol. II 115; vol. VIII 1246). It is a reality in Oklahoma City as it is in most other large urban cities. Thus, whether a neighborhood plan is adopted today, or twenty-five years from now, it will result in the creation of some racially identifiable schools. To say that the Oklahoma City School Board must maintain racial balance in its elementary schools to control the effects of residential segregation, is to say that the board must continue to bus its young students until such time residential segregation is eliminated. The elimination of residential segregation is not possible and certainly not required by the Constitution.

Respondents stress that some schools which were racially identifiable prior to court-ordered desegregation in Oklahoma City remain racially identifiable under the new plan. While this observation is not insignificant, it overlooks the fact that unlawful discrimination and its vestiges were removed from the Oklahoma City School District when it was declared unitary in 1977, and that no showing has been made to date demonstrating that the plan was adopted for unlawful discriminatory purposes.[31] In this context, we believe Professor Landsberg is correct:

---

[31] While we agree that the history of discrimination in Oklahoma City cannot be ignored, it "cannot in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion of the Court by Justice Stewart).

> Racial identifiability occurs because particular racial plants were built to serve one race or another and are associated in the minds of the public, including school children, with that race. Importing teachers and students of the other race into such schools eliminates at least some indicia of racial identifiability. If the school operates on a desegregated basis sufficiently long, public memory that the state designed the school to serve a particular race may fade. A return to neighborhood schools, under these circumstances does not necessarily entail a return to the former racial identity of the school. Although the former racial composition of the student enrollment may remain, that occurrence need not carry with it the stigma of the state's original designation. Such a school would be no different from a *de facto* segregated northern school."

Lansberg, *Retrogression Plan, supra*, at 819-820.

If the achievement of unitary status coupled with thirteen years of sustained good-faith compliance with a desegregation decree at the elementary level is insufficient to bring about the desired objective in Oklahoma City, then nothing short of busing our young students in perpetuity is, and nothing is worth that resolve.

4. Maintaining Unitary Status. – Notwithstanding the binding unitary declaration in Oklahoma City, the Tenth Circuit ruled the board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects." *Dowell*, 890 F.2d at 1504-1505 (quoting *Dayton II*, 443 U.S. at 538). This observation is incorrect.

It is only a school system "under an unsatisfied duty to liquidate a dual system" which must meet the burdens and presumptions flowing from the "affirmative duty" to desegregate. *Dayton II*, 443 U.S. at 538; *Swann*, 402 U.S. at 15. *Swann* ruled with clarity that once unitary status is achieved "the affirmative duty to desegregate has been accomplished." 402 U.S. at 32. *Accord Spangler*, 427 U.S. at 434. Therefore,

a school system which has achieved unitary status is relieved of the "affirmative duty" to desegregate, and returned to the same status as any other state actor. In order to maintain its unitary status, therefore, it must simply refrain from purposeful discrimination which would violate the Constitution.

II. THE COURT OF APPEALS' REASSESSMENT OF THE EVIDENCE, AND THE CHARACTERIZATION OF THE TRIAL COURT'S FINDINGS OF FACT AS CLEARLY ERRONEOUS, EXCEED THE CONFINES OF FED.R.CIV.P. 52(a).

A considered reading of the majority and dissenting opinions in *Dowell* leaves the unmistakable impression that the majority approached this case with the preconceived idea of a desired result, and then searched the record for any evidence to support it. Appellate review appears to have been directed towards a search for error, rather than the truth and in deference to the trial court,[32] with a resultant failure to abide by the confines of Fed.R.Civ.P. 52(a) and certain deviation from the function of an appellate court. Fed.R.Civ.P. 52(a) requires that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This standard

---

[32] As noted by the dissent, the majority's appellate fact-finding, while not only impermissible, was also not error free. 890 F.2d at 1533. The majority noted that the student reassignment plan was implemented in 1984, *Id.* at 1486, when in reality the plan was implemented in the 1985-86 school year. (R. vol. III 302). The majority also found that "thirty-two of the sixty-four elementary schools in Oklahoma City emerge from the plan as one-race majority schools," *Id.* at 1493. While not only calculated by a percentage employed by neither of the parties, *Id.* at 1487 n. 2, the majority reached this figure despite testimony by respondents' own witnesses that there were no ninety percent or more white schools. (R. vol. VIII 1207-08, 1351-52). Certainly a suspect pall is cast over the majority's review of facts when such errors appear in the summation of evidence.

precludes *de novo* review of the district court's findings and emphasizes that "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). A reviewing court cannot set aside findings of fact because it would view the facts differently, or give greater weight to certain evidence than the trial court. It is apparent that rather than the objective review required, the *Dowell* majority approached the evidentiary scales as fact-finder, reweighed the evidence, and in the process placed excessive sociological weight on the scales in favor of respondents.

The standard enunciated in Fed.R.Civ.P. 52(a), and repeatedly emphasized by this Court, does not require blind adherence to the trial court's findings of fact but certainly demands deference to the trial judge. Moreover, the nature of a desegregation case commands appellate review within the close strictures of Fed.R.Civ.P. 52(a). "[T]he elimination of the more conspicuous forms of governmentally ordained racial segregation over the last twenty-five years counsels *undiminished deference* to the factual adjudications of the federal trial judges in [school desegregation] cases, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit." *Columbus v. Penick*, 443 U.S. 449, 470 (1979) (Stewart, J., joined by Burger, C. J., concurring) (emphasis added). *See also, Spallone v. United States*, 107 L.Ed.2d 644, 665 n. 4 (1990) (Brennan, J., dissenting); *Dayton II*, 443 U.S. at 543 (Rehnquist, J., joined by Powell, J., dissenting); *Swann*, 402 U.S. 12.

To do otherwise, and, in essence, require that a party persuade not only the trial judge, but also an appellate panel that their account of the facts is correct both invades the province of the trial court and ignores this Court's mandate that "the trial on the merits should be 'the main event' . . . rather than a 'tryout on the road' ". *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 [1977]).

While the docketing statement and briefs filed by respondents with the Tenth Circuit are barren of any assertion that

the district court's factual findings on the issue of intent was clearly erroneous, the court of appeals nevertheless addressed this issue. Notwithstanding that the burden is on the appealing party to preserve the issues, and that the appellate court must view the evidence in the light most favorable to the party who prevailed below, the majority dismissed those factual findings as clearly erroneous. As demonstrated by the trial court and so meticulously discussed by the dissent, the evidence was sufficient to warrant findings that 1) the Plan was adopted for legitimate non-discriminatory reasons, 2) the district remained unitary in 1987, and 3) the relationship between past segregative acts and present residential segregation had become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention.[33]

A. Lack of Discriminatory Intent.

In part to arrive at the finding that the student reassignment plan was adopted without discriminatory intent and for legitimate reasons, the trial court questioned various witnesses on the subject. The court was criticized by the majority because "discriminatory intent cannot be ascertained by eliciting opinion testimony from witnesses, . . . and accumulating those responses as substantive evidence of the motive for the Plan." 890 F.2d at 1503. The majority was persuaded that only circumstantial evidence should be utilized to establish segregative intent, or lack thereof. When the only evidence offered on intent by respondents was that the plan had a disproportionate impact upon some blacks in the school district, the district court correctly realized that this fact was insufficient to demonstrate an intent to discriminate on the basis of race. *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 265 (1977); *Dayton Bd. of Educ. v. Brinkman*, 443

[33] Indeed, the majority found there was "evidence to facially support the district court's findings." 890 F.2d at 1504. Where, as here "there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574.

U.S. 526, 536-537 n. 9 (1979) (*Dayton II*). Even respondents' witness, Dr. Taylor, found no evidence of discriminatory intent in connection with the adoption of the plan.[34] (R. vol. VIII 1237-38).

Surely, in light of all the evidence to the contrary, 890 F.2d 1523 n. 15, and especially when confronted with direct testimony regarding the lack of discriminatory intent in the plan's adoption from *both* parties, coupled with the ability to observe delivery of that testimony, it was reasonable for the court to conclude such intent was absent.

The district court's assessment of the motivating factors behind the plan's adoption and implementation is sound. The increased busing burdens on young black students as well as the threatened closure of schools in the northeast quadrant precipitated study and eventual modification of the Finger Plan (R. vol. IV 425-426). The court found a desire for increased parental participation, with its positive effects on educational achievement, as well as increased community involvement and support, were motivating factors in adoption of the plan. By contrast, no evidence was offered on behalf of respondents regarding intent aside from the disproportionate impact the plan had upon some blacks in the school district. Due deference to the trial court's finding on the issue of intent must recognize the propriety of that finding.

B. Maintenance of Unitary Status.

Respondents did not assert on appeal that the lower court's factual findings were clearly erroneous with respect to

[34] It is noteworthy that the court's questions were directed at a number of top level black administrators employed in the district. Each of these administrators responded that they detected no discriminatory animus behind the adoption or implementation of the plan. (R. vol. III 311; vol. IV 576; vol. V 586, 788, 798, 812). Also of note is Dr. Taylor's testimony regarding the positive impact of placing black individuals in positions of institutional responsibility. Even so, she was not aware of the racial composition of the Oklahoma City Schools' top administration until cross-examined regarding how such knowledge affected the formulation of her opinions. (R. vol. VIII 1241-43).

the unitary status of the district, and only contested that status at trial as to student population and faculty assignment. While evidence was presented by respondents in an effort to demonstrate a vestige of segregation remaining in Oklahoma City in that some schools with a higher concentration of black students had more black teachers than other elementary schools, the court found that contention without merit. The court noted the evidence showed the teacher and administrator preferences to a large extent determined faculty assignments following implementation of the plan and resulted in a larger percentage of black faculty in the majority black elementary schools. Nevertheless, efforts were exerted and did bring the faculty staff ratios into alignment with district wide ratios (R. vol. IV 570; vol. V 811, 814). In addition, Dr. Foster, respondents' expert witness, agreed that the efforts by the Board of Education and administration would completely bring the faculty assignments within racial balance and that any imbalance was not the result of an intent to discriminate (R. vol. VIII 1276; vol. IX 1388-1389). No evidence was presented that extra-curricular activities, expenditures, facilities, or transportation were not unitary in 1987. As repeatedly acknowledge from the stand, no student is compelled to attend any school on the basis of race (R. vol. VII 1097; vol. VIII 1196, 1255). The trial court's finding of continued unitary status must be upheld.[35]

C. Attenuation of Conditions.

The lower court was fully justified in concluding that the relationship between past segregative acts and present residential segregation had become so "attenuated" as to be

---

[35] Evidence demonstrated funding for the predominately black elementary school exceeded that for schools with less than 10% black population (R. vol. V 727), those facilities were maintained equally (R. vol. V 792-795), that teacher expectations for students were consistently high in all schools (R. vol. VI 889; vol. IV 535), and that extra-curricular activities were integrated. Finally it was uncontroverted that grades 5-12 remained fully integrated in all aspects.

incapable of supporting a finding of de jure segregation warranting judicial intervention. The court determined there had been a substantial change in conditions, totally eliminating the vestiges of unlawful discrimination from Oklahoma City, which warranted dissolving the 1972 desegregation decree. Previous state-imposed barriers had been removed which prevented the black population from disbursing throughout the community. Effective remedies were in place to combat remaining private prejudice.[36] Witnesses testified without contradiction that today black people in Oklahoma City voluntarily choose where they wish to reside (R. vol. III 313; vol. V 678). The migration of the black population into previously all white neighborhoods has had a direct impact on the racial compositions of the schools in Oklahoma City. Black students now reside in every neighborhood attendance area in the Oklahoma City School District. This is a dramatic departure from the situation in 1972 when virtually no black students resided in thirty-nine of the same attendance areas (Def.Ex.11, R. vol. II 136, vol. III 295).

Remaining residential segregation has many causes. To place the burden and consequences of societal prejudice on the school district as a cause of residential segregation and disproportionate racial concentrations in some schools exceeds the constitutional mandates of this Court. The uncontroverted evidence demonstrated that no school district nor any desegregation decree can completely eliminate residential segregation. Even so, testimony acknowledged that the school district had experienced drastic demographic changes in residential patterns which almost doubled the exposure of blacks to whites since the early 1960's. The lower court's decision to give more credence to the evidence offered on behalf of the

---

[36] The district court detailed the protective legislation which has replaced former segregative laws, ordinances and restrictive covenants. 677 F.Supp. 1503 at 1511. Further, witnesses called on behalf of each of the parties noted their membership on the Metropolitan Fair Housing Board and Council, and the success that organization has experienced in combating private housing discrimination (R. vol. III 298; vol. VII 1167, 1176).

school district with regard to the substantial change in conditions and attenuation of residential segregation cannot be clearly erroneous. Indeed, *Dowell's* failure to defer to the district court's findings "is difficult to fathom". *See, e.g., Amadeo v. Zant,* 486 U.S. 214 (1988).

In sum, "[W]hen the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the district court's conclusion was clearly erroneous." *Anderson v. Bessemer City,* 470 U.S. 567, 577 (1985).

CONCLUSION

For the foregoing reasons the decision of the Tenth Circuit Court of Appeals should be reversed, and the decision of the district court should be affirmed and reinstated in its entirety.

Respectfully submitted,

Ronald L. Day*
Laurie W. Jones
Fenton, Fenton, Smith,
Reneau & Moon
One Leadership Square,
Suite 800
211 North Robinson
Oklahoma City, Oklahoma 73102

Attorneys for Petitioner

*Counsel of Record